

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION

MDL 2724
16-MD-2724
HON. CYNTHIA M. RUFE

THIS DOCUMENT RELATES TO:

THE KROGER CO., et al.,
Plaintiffs,
v.

18-CV-284

ACTAVIS HOLDCO U.S., INC., et al.,
Defendants.

**DEFENDANTS' REPLY TO THE KROGER DIRECT-ACTION PLAINTIFFS'
RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

The Kroger DAPs' Response to Defendants' Notice of Supplemental Authority does nothing to change the conclusion that their Motion for Leave to Amend should be denied.

In *In re Nat'l Prescription Opiate Litigation*, --- F.3d ---, 2020 WL 1875174 (6th Cir. Apr. 15, 2020), the Sixth Circuit issued a writ of mandamus instructing the district court to strike an untimely amended complaint submitted after the district court's deadline for amending pleadings. Like the *Opiate* plaintiffs, the Kroger DAPs are attempting to amend a complaint after the district court's deadline for amending pleadings has expired. The Sixth Circuit held that Rule 16 applies in these circumstances and requires plaintiffs to show—without exception—good cause, meaning they acted diligently in pursuing amendment:

[T]he district court's stated basis for finding good cause—namely, that the trial would be most efficient if it included [the amended claims]—is simply no substitute for the showing of diligence required by the Rule. To the contrary, the requirements of the Civil Rules in an MDL case—indeed, the requirements for granting a motion to amend in particular—are the same as those for ordinary litigation on an ordinary docket.

Respectfully, the district court's mistake was to think it had authority to disregard the Rules' requirements . . . in favor of enhancing the efficiency of the MDL as a whole.

2020 WL 1875174, at *3 (internal citation and quotation marks omitted). Thus, even though the Kroger DAPs assert that “discovery in this MDL is still at its nascent stage . . . and deposition discovery has not yet commenced,” Response to Notice of Suppl. Auth. (“Resp.”) at 3, they still must show they acted diligently in pursuing amendment, which they cannot do.

The Kroger DAPs are not relieved of their burden of satisfying Rule 16 based on the purported differences they posit between the circumstances in *Opiate* and this case. For example, the Kroger DAPs assert that “[i]n this case (unlike in *Opiate*), the operative case management order and the Court’s comments at multiple status hearings expressly contemplate amended pleadings.” Resp. at 1. Not true. Just as the case management order in *Opiate* set an amendment deadline, 2020 WL 1875174, at *1, this Court set a December 2018 deadline for amending pleadings in PTO 61. Nothing about PTO 105 or the Court’s comments at status conferences vacate or change the deadline set by PTO 61. Sur-Reply (ECF No. 217) at 3-5. The Kroger DAPs also assert they sought leave to amend while fact discovery is ongoing, unlike the plaintiffs in *Opiate*. Resp. at 2. That distinction is meaningless, unless the Kroger DAPs show they acted diligently in pursuing amendment. They have not. Opp. (ECF No. 206) at 7-11; Sur-Reply at 6-8.

The Kroger DAPs are likewise wrong that the *Opiate* opinion somehow supports their misguided interpretation that PTO 61 is not a “Rule 16 scheduling order,” such that they are relieved of their burden of satisfying the Rule 16 good cause standard. Nowhere does the Sixth Circuit state that the Rule 16 standard applies only if the district court’s order both sets an amendment deadline and includes other items, such as “deadlines to join other parties, complete discovery, and file motions.” Resp. at 2. Indeed, the Sixth Circuit never references those other items at all. Instead, the Sixth Circuit applies the Rule 16 good cause standard because the

district court set an amendment deadline, and then 19 months after the deadline expired, the opioid plaintiffs sought leave to amend. *Opiate*, 2020 WL 1875174, at *2. The same is true here—the Rule 16 good cause standard applies because PTO 61 set an amendment deadline, and then 20 months after the deadline expired, the Kroger DAPs sought leave to amend. *Opp.* at 7-11; *Sur-Reply* at 6-8.

Finally, contrasting the *Opiate* opinion with this case does not show that the Kroger DAPs have met their burden of showing good cause. *Resp.* at 3. Like the plaintiffs in *Opiate*, the Kroger DAPs’ Motion for Leave to Amend did not even attempt to show the diligence that is required to meet the good cause standard. *Opiate*, 2020 WL 1875174, at *3; *Opp.* at 7. Their belated attempt to do so in their Reply fails as well. *Sur-Reply* at 6-8. And although it is incorrect to say that “no one is prejudiced by” the Kroger DAPs’ proposed SAC, *Resp.* 3—indeed, there are 14 motions to dismiss the FAC still pending—“the absence of prejudice . . . does not constitute ‘good cause’ under Rule 16” in any event. *Harbor Laundry Sales, Inc. v. Mayflower Textile Servs. Co.*, No. 09-6259. 2011 WL 6303258, at *3 (D.N.J. Dec. 16, 2011).

Accordingly, the Kroger DAPs, like the plaintiffs in *Opiate*, have not met their burden of showing good cause, and their Motion for Leave to Amend should be denied.

Dated: April 30, 2020

Respectfully submitted,

/s/ Steven A. Reed

Steven A. Reed

R. Brendan Fee

Melina R. DiMattio

MORGAN, LEWIS & BOCKIUS LLP

1701 Market Street

Philadelphia, PA 19103

Telephone: +1.215.963.5000

Facsimile: +215.963.5001

steve.reed@morganlewis.com

brendan.fee@morganlewis.com

melina.dimattio@morganlewis.com

Wendy West Feinstein

One Oxford Centre

Thirty-Second Floor

Pittsburgh, PA 15219-6401

Telephone: +1.412.560.7455

Facsimile: +1.412.560.7001

wendy.feinstein@morganlewis.com

Attorneys for Defendant

Glenmark Pharmaceuticals, Inc., USA

/s/ Robin D. Adelstein

Robin D. Adelstein

Mark A. Robertson

Gerald A. Stein

NORTON ROSE FULBRIGHT US LLP

1301 Avenue of the Americas

New York, NJ 10019-6022

Tel.: 212-318-3000

Robin.adelstein@nortonrosefulbright.com

Mark.roberston@nortonrosefulbright.com

Gerald.stein@nortonrosefulbright.com

Attorneys for Defendants Valeant

Pharmaceuticals North America LLC,

Valeant Pharmaceuticals International, and

Oceanside Pharmaceuticals, Inc.

/s/ Heather K. McDevitt

Heather K. McDevitt

Bryan D. Gant

WHITE & CASE LLP

1221 Avenue of the Americas

New York, New York 10020

Tel.: (212) 819-8200

Fax: (212) 354-8113

hmcdevitt@whitecase.com

bgant@whitecase.com

Counsel for Defendant Teligent, Inc.

/s/ Seth A. Moskowitz

Seth A. Moskowitz

KASOWITZ BENSON TORRES LLP

1633 Broadway

New York, New York 10019

Tel: (212) 506-1700

Fax: (212) 506-1800

smoskowitz@kasowitz.com

*Counsel for Actavis Holdco U.S., Inc. and
Actavis Pharma, Inc.*

/s/ J. Clayton Everett, Jr.

Scott A. Stempel

J. Clayton Everett, Jr.

Tracey F. Milich

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, NW

Washington, D.C. 20004

Phone: (202) 739-3000

Fax: (202) 739-3001

scott.stempel@morganlewis.com

clay.everett@morganlewis.com

tracey.milich@morganlewis.com

Harvey Bartle IV

Francis A. DeSimone

MORGAN, LEWIS & BOCKIUS LLP

1701 Market Street

Philadelphia, PA 19103

Phone: (215) 963-5000

Fax: (215) 963-5001

harvey.bartle@morganlewis.com

frank.desimone@morganlewis.com

*Counsel for Defendant Perrigo New York,
Inc.*

/s/ James W. Matthews

James W. Matthews

Katy E. Koski

John F. Nagle

FOLEY & LARDNER LLP

111 Huntington Avenue

Boston, Massachusetts 02199

Tel: (617) 342-4000

Fax: (617) 342-4001

jmatthews@foley.com

kkoski@foley.com

jnagle@foley.com

James T. McKeown

Elizabeth A. N. Haas

Kate E. Gehl

FOLEY & LARDNER LLP

777 E. Wisconsin Avenue

Milwaukee, WI 53202

Tel: (414) 271-2400

Fax: (414) 297-4900

jmckeown@foley.com

ehaas@foley.com

kgehl@foley.com

Steven F. Cherry

April N. Williams

Claire Bergeron

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue, NW

Washington, D.C. 20006

Tel: (202) 663-6000

Fax: (202) 663-6363

steven.cherry@wilmerhale.com

april.williams@wilmerhale.com

claire.bergeron@wilmerhale.com

Terry M. Henry
Melanie S. Carter
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5644
Fax: (215) 832-5644
THenry@blankrome.com
MCarter@blankrome.com

Attorneys for Defendant Apotex Corp.

/s/ Gerald E. Arth

Gerald E. Arth
Ryan T. Becker
FOX ROTHSCCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
Tel.: (215) 299-2000
Fax: (215) 299-2150
garth@foxrothschild.com
rbecker@foxrothschild.com

George G. Gordon
Stephen D. Brown
Julia Chapman
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104-2808
Tel.: (215) 994-2382
Fax: (215) 655-2240
george.gordon@dechert.com
stephen.brown@dechert.com
julia.chapman@dechert.com

Counsel for Lannett Company, Inc.

/s/ John E. Schmidtlein

John E. Schmidtlein
Sarah F. Kirkpatrick
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Phone: (202) 434-5000

Fax: (202) 434-5029
jschmidtlein@wc.com
skirkpatrick@wc.com

Attorneys for Par Pharmaceutical, Inc.

/s/ Anthony C. Porcelli

Anthony C. Porcelli
POLSINELLI PC
150 North Riverside Plaza, Suite 3000
Chicago, IL 60606
Tel: (312) 819-1900
Fax: (312) 819-1910
aporcelli@polsinelli.com

Amy D. Fitts
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City, MO 64112
Tel: (816) 753-1000
Fax: (816) 222-0425
afitts@polsinelli.com

Counsel for Defendants Akorn, Inc. and Hi-Tech Pharmacal Co. Inc.

/s/ Jason R. Parish

Jason R. Parish
Martin J. Amundson
BUCHANAN INGERSOLL & ROONEY PC
1700 K Street, NW
Washington, D.C. 20006
Telephone: (202) 452-7900
jason.parish@bipc.com
martin.amundson@bipc.com

Bradley Kitlowski
BUCHANAN INGERSOLL & ROONEY PC
Union Trust Building
501 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 562-8800

bradley.kitlowski@bipc.com

*Counsel for Zydus Pharmaceuticals (USA)
Inc.*

/s/ Jeffrey D. Smith

Jeffrey D. Smith
Thomas A. Abbate
Amar A. Mehta
Gabrielle J. Canaie
**DECOTIIS, FITZPATRICK, COLE &
GIBLIN, LLP**
61 South Paramus Road, Suite 250
Paramus, NJ 07652
Tel: (201) 928-1100
Fax: (201) 928-0588
jsmith@decotiislaw.com
tabbate@decotiislaw.com
amehta@decotiislaw.com
gcanaie@decotiislaw.com

Counsel for Epic Pharma, LLC

/s/ Saul P. Morgenstern

Saul P. Morgenstern
Margaret A. Rogers
**ARNOLD & PORTER
KAYE SCHOLER LLP**
250 W. 55th Street
New York, NY 10019
Tel: (212) 836-8000
Fax: (212) 836-8689
saul.morgenstern@arnoldporter.com
margaret.rogers@arnoldporter.com

Laura S. Shores
**ARNOLD & PORTER
KAYE SCHOLER LLP**
601 Massachusetts Avenue
Washington, DC 20001
Tel: (202) 942-5000
Fax: (202) 942-5999
laura.shores@arnoldporter.com

*Counsel for Sandoz and Fougera
Pharmaceuticals, Inc.*

/s/ William A. Escobar

William A Escobar
Damon W Suden
Clifford E. Katz
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, New York 10178
Tel: (212) 808-7800
Fax: (212) 808-7897
wescobar@kelleydrye.com
dsuden@kelleydrye.com
ckatz@kelleydrye.com

*Counsel for Wockhardt USA LLC and
Morton Grove Pharmaceuticals, Inc.*

/s/ Michael Martinez

Michael Martinez
Steven Kowal
Lauren Norris Donahue
Brian J. Smith
K&L GATES LLP
70 W. Madison St., Suite 3300
Chicago, IL 60602
Tel. 312-372-1121
Fax 312-827-8000
michael.martinez@klgates.com
steven.kowal@klgates.com
lauren.donahue@klgates.com
brian.j.smith@klgates.com

Counsel for Defendant Mayne Pharma Inc.

/s/ Steven E. Bizar

Steven E. Bizar
John P. McClam
Tiffany E. Engsell
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000
steven.bizar@dechert.com
john.mcclam@dechert.com
tiffany.engsell@dechert.com

Counsel for Citron Pharma LLC

/s/ Marguerite M. Sullivan

Marguerite M. Sullivan (pro hac vice)
Anna M. Rathbun (pro hac vice)
LATHAM & WATKINS LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C., 20004
(202)-637-2200
marguerite.sullivan@lw.com
anna.rathbun@lw.com

*Attorneys for Defendant
G&W Laboratories, Inc.*

/s/ Jan P. Levine

Jan P. Levine
Robin P. Sumner
Michael J. Hartman
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
Tel. (215) 981-4000
Fax. (215) 981-4750
levinej@pepperlaw.com
sumnerr@pepperlaw.com
hartmann@pepperlaw.com

*Attorneys for Defendant West-Ward
Pharmaceuticals Corp.*

/s/ Stacey Anne Mahoney

Stacey Anne Mahoney
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
Telephone: (212) 309-6000
Facsimile: (212) 309-6001
stacey.mahoney@morganlewis.com

*Counsel for Defendant Breckenridge
Pharmaceutical, Inc.*

/s/ Chul Pak

Chul Pak
**WILSON SONSINI GOODRICH &
ROSATI, PC**
1301 Avenue of the Americas 40th Floor
New York, New York 10019
Tel: (212) 497-7726
Fax: (212) 999-5899
cpak@wsgr.com

Seth C. Silber
Jeffrey C. Bank
**WILSON SONSINI GOODRICH &
ROSATI, PC**
1700 K Street, NW Fifth Floor
Washington, DC 20006
Tel: (202) 973-8824
Fax: (202) 973-8899
ssilber@wsgr.com
jbank@wsgr.com

Adam K. Levin
Benjamin F. Holt
Justin W. Bernick
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
Tel: (202) 637-5600
Fax: (202) 637-5910
adam.levin@hoganlovells.com

benjamin.holt@hoganlovells.com
justin.bernack@hoganlovells.com

*Counsel for Defendants Mylan Inc., Mylan
Pharmaceuticals, Inc., UDL Laboratories,
Inc., and Mylan N.V*

/s/ Erik T. Koons

John M. Taladay
Erik T. Koons
Stacy L. Turner
Christopher P. Wilson
BAKER BOTTS LLP
700 K Street NW
Washington, DC 20001
Telephone: (202) 639-7700
Facsimile: (202) 639-7890
john.taladay@bakerbotts.com
erik.koons@bakerbotts.com
stacy.turner@bakerbotts.com
christopher.wilson@bakerbotts.com

Lauri A. Kavulich
Ann E. Lemmo
CLARK HILL PLC
2001 Market St, Suite 2620
Philadelphia, PA 19103
Telephone: (215) 640-8500
Facsimile: (215) 640-8501
lkavulich@clarkhill.com
alemmono@clarkhill.com

Lindsay S. Fouse
CLARK HILL PLC
301 Grant St, 14th Floor
Pittsburgh, PA 15219
Telephone: (412) 394-7711
Facsimile: (412) 394-2555
lfouse@clarkhill.com

*Counsel for Defendants Sun Pharmaceutical
Industries, Inc. and Taro Pharmaceuticals
USA, Inc.*

/s/ Wayne A. Mack

Wayne A. Mack
DUANE MORRIS LLP
30 S. 17th Street
Philadelphia, PA 19103
Tel: +1215.979.1152
Fax: +1.215.689.2595
wamack@duanemorris.com

*Counsel for Defendant Aurobindo
Pharma USA, Inc.*

/s/ Raymond A. Jacobsen, Jr.

Raymond A. Jacobsen, Jr.
Paul M. Thompson
Lisa A. Peterson
MCDERMOTT WILL & EMERY LLP
500 N. Capitol St., NW
Washington, D.C. 20001
202-756-8000
Nicole L. Castle
MCDERMOTT WILL & EMERY LLP
340 Madison Ave.
New York, NY 10173
212-547-5400

Counsel for Impax Laboratories, Inc.

/s/ J. Gordon Cooney, Jr.

J. Gordon Cooney, Jr.
John J. Pease, III
Alison Tanchyk
William T. McEnroe
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Tel: (215) 963-5000
Fax: (215) 963-5001
jgcooney@morganlewis.com
john.pease@morganlewis.com
alison.tanchyk@morganlewis.com
william.mcenroe@morganlewis.com

Amanda B. Robinson
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
Tel: (202) 739-3000
Fax: (202) 739-3001
amanda.robinson@morganlewis.com

*Counsel for Defendant Teva
Pharmaceuticals USA, Inc. and Pliva*

/s/ Roger B. Kaplan

Roger B. Kaplan
Jason Kislin
Aaron Van Nostrand
GREENBERG TRAUIG LLP
500 Campus Drive, Suite 400
Florham Park, NJ 07931
(973) 360-7900

Brian T. Feeney
GREENBERG TRAUIG, LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103
(215) 988-7812

*Counsel for Defendant Dr. Reddy's
Laboratories, Inc.*

/s/ Edward B. Schwartz

Edward B. Schwartz
Andrew C. Bernasconi
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Tel: (202) 414-9232
Fax: (202) 414-9299
eschwartz@reedsmith.com
abernasconi@reedsmith.com

*Counsel for Defendant Heritage
Pharmaceuticals Inc.*

/s/ Leiv Blad

Leiv Blad
Zarema Jaramillo
Ario Fazli
LOWENSTEIN SANDLER LLP
2200 Pennsylvania Avenue
Washington, DC 20037
Tel.: (202) 753-3800
Fax: (202) 753-3838
lblad@lowenstein.com
zjaramillo@lowenstein.com
afazli@lowenstein.com

Attorneys for Lupin Pharmaceuticals, Inc.

/s/ Jay P. Lefkowitz

Jay P. Lefkowitz, P.C.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022-4611
Tel.: (212) 446-4800
Fax: (212) 446-4900
Email: lefkowitz@kirkland.com

/s/ Devora W. Allon

Devora W. Allon
Alexia R. Brancato
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022-4611
Tel.: (212) 446-4800
Fax: (212) 446-4900
Email: devora.allon@kirkland.com
Email: alexia.brancato@kirkland.com

*Attorneys for Defendant Upsher-Smith
Laboratories, LLC*